IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPEAL NO.425 OF 2001
WITH
SUO-MOTU APPLICATION NO.3 OF 2002

Bhalkya Ambrushi Kale,
R/o. Valuj (Degaon), Tal: Mohol,
Dist. Solapur,
At present in Yerwada Central Prison,
Pune ...Appellant.
V/s.

1. The State of Maharashtra
2. Karimulla Ismail Patel, Police Constable.
3. Uttam Anant Chavan, Police Constable
4. Police Constable Patil, B.No.1336,
   Nos.2 to 4 r/o. Vairag, Tal: Barshi,
   Dist. Solapur ...Respondents.

Shri Sandip S. Salunke, adv. for the appellant.
Shri D.P.Adsule, APP for the State.

WITH
SUO-MOTU APPLICATION NO.3 OF 2002

The Court on its own Motion ...Appellant.
v/s.
Bhalkya Ambrushi Kale ...Respondent.
(Original Accused No.2)

Shri D.P.Adsule, APP for the Appellant.
Shri Sandip S. Salunke, adv. for the Respondent.

CORAM: J.H.BHATIA, J.
DATE : 20th June, 2007.

ORAL JUDGMENT:

1. The appellant, who is the original accused no.2, has preferred this appeal against the judgment and order of conviction for the offences punishable under Sections 353, 333, 395 and 397 passed by the Additional

Sessions Judge, Solapur in Sessions Case No.29 of 2001. He was sentenced to undergo R.I. for one year and to pay fine of Rs.1,000/- and in default further S.I. for 3 months for the offence punishable under Section 353 of the I.P.C. For the offences punishable under Sections 333 and 395 he was sentenced to undergo R.I. for 5 years and to pay fine of Rs.3,000/- and in default S.I. for one year and 3 months on each count. For the offence punishable under Section 397 of the I.P.C., he was separately sentenced to undergo R.I. for a period of two years and to pay a fine of Rs.5,000/- and in default S.I. for 15 months.

2. At the outset, it may be stated that in view of conviction of the accused/appellant for the offence punishable under Section 397 and a sentence of R.I. for 2 years only, which is less than minimum prescribed by the law, this Court had issued a Suo-Motu notice to the accused/appellant to show cause why the sentence for the offence punishable under Section 397 of the I.P.C. should not be enhanced. The present appeal and Suo-Motu application shall be decided and disposed off by this common judgment.

3. To state in brief, prosecution case is that one Rajya Kale son of accused no.1 Ambrushi Kale was wanted

in crime no.14 of 1999 registered at Police Station Vairag, Taluka: Barshi. P.W.11 P.C.Karimulla Patel, P.W.8 P.C.Uttam Chavan and P.C.Patil were on duty at weekly bazar at Vairag for the maintenance of law and order on 2-8-2000. On that day, P.C.Karimulla received information from informer Chandrakant Shinde that the wanted accused Rajya Kale had taken shelter in a Pal, which means a group of huts inhabitated by Paradhi community, belonging to his father Ambrushi Kale. Therefore, P.C.Karimulla alongwith P.C.Chavan , P.C.Patil and informer Chandrakant Kale left Vairag to go to said Pal. They reached village Mungashi on their motorcycles and from there they also requested P.W.2 Jarichand Kshirsagar and others to accompany them. Accordingly, this team reached near the land of one Lahu Mote where the wanted accused Rajya Kale had taken shelter. According to the prosecution, when the police party reached near the huts, all the accused nos.1 to 8 started shouting and raising hue and cry. Due to this Jarichand and others, who had joined the police party from village Mungashi ran away. The accused persons rushed towards the police constables with deadly weapons like sticks, axes, sickles called kattis and caused injuries to P.C.Karimulla, P.C.Chavan and P.C.Patil. In the said incident some of the accused persons robbed Constable Karimulla of his valuable articles and some of

the accused also robbed P.C.Chavan. During the incident P.C.Patil escaped from the clutches of the accused persons and from village Valuj, he gave telephonic message to Vairag Police Station, after which necessary police force was deputed. Injured police constables were taken to the hospital. P.C.Karimulla lodged a report Exhibit 25 about this incident on the basis of which crime no.222 of 2000 came to be registered against 8 accused persons. After investigation charge-sheet was filed against eight accused persons.

4. It may be noted that out of 8 accused persons, accused no.2 Bhalkya, who is the present appellant is a son of Ambrushi Kale and brother of wanted accused Rajya Kale. Accused No.3 Surekha is wife of the appellant/accused no.2, accused nos.4 to 6 appear to be sons of the accused no.1 Ambrushi, accused nos.7 and 8, who are ladies also appear to be the members of the family. Rajya Kale is not one of the 8 accused persons. Accused nos.4 to 8 were shown to be absconding and only accused nos.1 to 3 were actually put to trial. Accused no.3 was acquitted while accused nos.1 and 2 were convicted and sentenced as stated above.

5. On behalf of the prosecution, in all 12 witnesses were examined to prove the offence and to

bring home the guilt of the accused. Several documents were placed on record. It may be noted that the incident of this case had taken place on 2-8-2000. However, at that time none of the accused could be apprehended and according to the prosecution, the present appellant and his father accused no.1 Ambrushi were arrested on 18-10-2000 under a panchanama recorded at the office of Superintendent of Police (Rural), Solapur. They were initially arrested at Karnala in some other crime and were transferred to this case on 19-10-2000. At the time of their arrest, there were certain injuries on their persons and they were referred to medical officer, P.W.7 Dr.Ajay Shinde. However, that evidence is not material in the decision of the present case.

6. Evidence of P.W.11 Karimulla and P.W.8 Uttam Chavan is material for the decision of the present matter. Their evidence shows that information was received that Rajya Kale, who was wanted accused in crime no.14 of 1999 of Vairag Police Station was hiding himself in a Pal on the agricultural land of one Lahu Mote. As per the information received on that day, P.W.11 P.C.Karimulla, P.W.8 P.C.Uttam Chavan and P.C.Patil alongwith their informer left Vairag on motorcycles and alongwith some other persons from

village Mungashi, they went to the spot. Evidence of P.W.11 P.C.Karimulla reveals that when they reached near the spot, they saw absconding accused Rajya Kale and accused Rajya Kale also saw the police party and shouted. At that time 2-3 persons came out from the huts. They were armed with sticks and axes. Accused no.1 Ambrushi was holding axe, accused Nandya and accused Pappya were holding kattis, which is a kind sickle. According to him the present appellant Bhalkya was also holding an axe. Raja was also holding a stick. Three ladies also accompanied them. He deposed that accused Nandya, Pappya, Raja, Ambrushi and the present appellant Bhalkya were among those persons. He specified that accused Nandya rushed towards his person with axe. Accused Pappya rushed towards him with the help of katti. Accused Nandya caused injury on his forearm with axe. Pappya gave blow on his back from the blunt side of katti. They also caused some other injuries. At that time other two police constables were also assaulted by the accused persons. However, P.C.Patil escaped from the spot and constable Chavan sustained injuries. Karimulla further deposed that in the said incident, he was robbed by the aforesaid persons to the tune of amount of Rs.1400/-, wrist watch, motor-cycle license and a diary. According to him P.C.Chavan was also robbed of wrist watch, motor-cycle

license, goggle, gold ring and an amount of Rs.100/-.

7. P.W.8 Uttam also deposed about the presence of accused Nandya, Pappya, Ambrushi and three ladies and one more person, whose name was not known to him at that time. But he identified that person as present appellant Bhalkya before the Court. According to him, he was caught hold of by two ladies and he was beaten by Pappya and Ambrushi. He deposed that accused Pappya had taken away his wrist watch, gold ring and amount of Rs.100/- alongwith his identity card and license of the motor-cycle. According to him, P.C.Karimulla was beaten by Nandya and one lady and P.C.Karimulla was robbed of an amount of Rs.1400/-, wrist watch, identity card and license by the aforesaid persons.

8. It is material to note that in the F.I.R. Ex. 25 lodged by P.C.Karimulla Patel, there was no reference to the name of the present appellant Bhalkya. In the F.I.R., it was mentioned that Nandya, Pappya and Ambrushi, one unknown person and 3 females were assailants. No description of that unknown person was given in the F.I.R. Test Identification Parade was not held to find out whether the present appellant/accused Bhalkya was that unknown person, who was referred in the F.I.R. P.W.11 Karimulla identified the present

appellant for the first time in his evidence before the Court, which was recorded about 8 months after the incident. P.W.8 Constable Uttam Chavan admitted that in his statement before the police during investigation there was no reference to the accused no.2 Bhalkya and his wife, who was accused no.3. In view of this, it is clear that neither in the F.I.R nor in the statements recorded by the police, there was any reference to the presence of the present appellant during that incident. In the F.I.R. Ex. 25 lodged by Karimulla, admittedly he had not even stated that unknown person was armed with any weapon. Thus, even if for a moment, it is believed that the present appellant was present at the spot, the F.I.R. does not show that he was holding any weapon. As the police party went near the house of the accused persons to arrest absconding accused Raja Kale, the presence of the present appellant at that spot could not be unnatural and merely because of his presence, it can not be inferred that he had committed any offence or he was there with intent to commit any robbery or dacoity.

9. Evidence of P.W.10 Dr.Sagar Shete reveals that he had examined P.C.Uttam Chavan, P.C.Patil and P.C.Karimulla Patel on 2-8-2000 and he had found several injuries on their persons. Some of them were incised

and some were contusions, etc. Therefore, it can be believed that these police constables were attacked and injured in that incident.

10. However, merely because police constables were attacked and injured when they went to arrest wanted accused Rajya Kale, all the members of the family could not be held guilty for the assault on the police. As far as charge of dacoity is concerned, evidence of P.W.8 constable Uttam Chavan shows that the accused Pappya had taken out his wrist watch, gold ring, amount of Rs.100, identity card and license of the motor-cycle. According to him, accused Nandya and one lady had assaulted P.C.Karimulla with axe and katti and had taken away amount of Rs.1400/-, wrist watch, identity card and license from him. According to P.C.Karimulla, he was robbed of cash and other articles by the persons, who had assaulted him and he deposed that he was assaulted and injured by accused Pappya and accused Nandya. In his F.I.R., he had stated that 3 ladies had scuffled with him and had injured him and they had taken away amount of Rs.1400/-, wrist watch and other articles. Thus, there was no allegation either in the F.I.R. or in the oral evidence that any of these two police constables was robbed of any valuable articles by the present appellant.

11. The learned trial Court held that the offence of dacoity was proved and he convicted the accused nos.1 and 2. Section 395 of the I.P.C. only provides for punishment for the offence of dacoity. Offence of dacoity is defined in Section 391 as follows:

> 391.Dacoity.-
>
> When five or more persons **conjointly** commit or attempt to commit a robbery, or where the whole number of persons **conjointly** committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

12. From the language of Section 391, it is clear that offence of robbery, when committed or attempted **conjointly** by 5 or more persons, all the persons are held liable for the offence of dacoity. The word **'conjointly'** has an important significance in assessing liability of the persons accused of the offence of dacoity. Mere presence of the accused amongst the robbers is not sufficient. The word **'conjointly'** used in Section 391 manifestly refers to the united or concerted action of the persons participating in the offence. If during the certain incident one or more persons by their individual act commit robbery and that act is not a result of united or concerted action, it

can not be said that all the persons, who were involved in that incident had conjointly committed the offence of robbery. The persons, who may have actually committed the offence of robbery may be held guilty for their act. Accused persons may be held guilty for the offence of dacoity only if the prosecution proves that five or more persons acted conjointly to commit dacoity or in attempt to commit dacoity.

13. In **A.I.R. (38) 1951 Assam 143 (2) Dambarudhar Injal & others v. The State**, the Division Bench of Assam High Court observed as follows:

> The learned Judge has apparently failed to notice that the word 'conjointly' is the most important word bearing on the liability of persons accused of an offence of dacoity. While it may be true to say that common intention is no part of the offence of dacoity, the word 'conjointly' used in S.391 I.P.C. manifestly refers to united or concerted action of the persons participating in the transaction. If individual acts of persons cannot reasonably be referred to a united or concerted action of such persons, there cannot be any question of any conviction for an offence of dacoity of the group of persons concerned. It is only when their individual actions can be properly referred to their concerted action that the question of a conviction under s.395, I.P.C. can arise."

In that case, the prosecution case was that the accused persons in a body surrounded the complainant's cart to see if it carried any paddy. The complainant, who was

following the cart on a bicycle, resented this interference and had an altercation with the accused. Some of the accused got infuriated and began to assault the complainant and his companion and ultimately dispersed after taking away their bicycles. There was no grain in the cart and nothing was removed from it. In such circumstances, it was held that purpose of the persons, who surrounded the cart was only to check whether cart was carrying any paddy. Altercation had taken place abruptly between the complainant and some of the accused and some of the accused had taken away the bicycle of the complainant. Therefore, it could not be held that all the persons, who were present there, were acting conjointly for the commission of the offence of robbery and they could not be held guilty under Section 395 of the I.P.C.

14. In **Boya Musala Hanumanthu and ten others v. The State of Andhra Pradesh, Madras Law Journal Reports (Andhra High Court) 1954,** the facts were almost identical to the facts of the present case. It will useful to quote relevant part of the judgment, which is as follows:

> "The essence of the offence of dacoity is the conjoint act of five or more persons to commit or attempt to commit robbery. In this case, it

> is not the prosecution case that the object of the rescuers was also to commit the offence of robbery. As already stated supra, they are said to have been actuated by the common object of rescuing certain persons from the custody of P.W.1 and the Prohibition Guards. If in attempting to rescue them, one of the members of the unlawful assembly suddenly seized an object in the hands of one of the officers, it could not be said that it was the conjoint act of all the members of the mob. Only for acts committed by one of the members of the unlawful assembly in pursuance of the common object, could all of them be found guilty. But, if that act is dissociated from the common object, it cannot be brought home to the other members. If follows that the ingredients essential to constitute the offence of dacoity are absent in this case, even accepting the prosecution case in toto. Therefore, the offence under section 395 should be deleted."

15. In the present case, some police constables went to the pal or huts of the Paradhi people to arrest one Raja Kale, who was wanted in a criminal case. At that time, some persons from the family assembled and they assaulted and injured the police constables. Some of them allegedly robbed two police constables of their valuable articles. It is not the case of the prosecution that the accused persons had been to some other place to commit dacoity or robbery having made preparations and while committing the offence, some of them assaulted and caused injuries to some persons and also committed robbery. If that would be so, it could be stated that all the persons, who had assembled and conjointly acted to commit the offence of robbery were

liable to be convicted under Section 395 of the I.P.C. In the present case, accused persons were in their own houses. Therefore, it could not be said that they had prepared or assembled to commit the offence of robbery or dacoity. Fight took place between the police and some of the persons abruptly when the police went there to arrest the wanted accused Rajya Kale. During that fight if one or the other person also committed robbery, it cannot be held that all the persons, who were involved in that fight, were acting conjointly to commit the offence of robbery. Therefore, I find that the prosecution has failed to prove that the offence of dacoity was committed by five or more persons and in the result, Section 395 of the I.P.C. could not be invoked.

16. The learned trial Court committed several errors in passing the final order of conviction. He convicted the present appellant and the accused no.1 Ambrushi for the offence punishable under Section 333 of the I.P.C. Section 333 is applicable only when grievous hurt is voluntarily caused to the public servant in discharge of his duty as public servant or with intent to prevent or deter public servant from discharging his duties as such. In the present case though certain injuries were found on the person of 3 police constables not a single injury was grievous, all the injuries were

simple. Therefore, Section 333 of the I.P.C. could not be invoked. At the most culprit could be convicted under Section 332 of the I.P.C.

17. When a accused is charged for the offence punishable under Section 353 as well as with Sections 332 or 333 of the I.P.C. on the ground that he had assaulted and by the same act had also caused injuries, there was no propriety in passing separate orders of conviction and sentence for the offence punishable under Section 353 of the I.P.C. against the accused, such accused could be convicted and sentenced either under Section 332 or 333 depending upon the nature of injuries caused. Reason is that an assault is less than the use of criminal force, the force being cut short before the blow actually falls. If the blow lands on the body of the person, the offence of using criminal force is committed. If such criminal force also results in hurt or grievous hurt, it becomes punishable under Sections 323 to 326 of the I.P.C. or under Section 332 or 333 of the I.P.C.

18. Thirdly, it is well settled position of law that Section 397 does not create any substantive offence. It only regulates the sentence in case of robbery or dacoity punishable under Sections 392 or 395

respectively. Section 397 provides that if, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years. It is well settled position of the law that only the accused, who actually uses deadly weapon at the time of commission of the offence or robbery or dacoity is covered under Section 397 and all the accused persons can not be convicted and sentenced with the help of Section 397. In the present case, firstly there was no evidence that the present appellant was present at the spot of incident when the incident occurred. Secondly, merely because of his presence at the spot near his house, he could not be held guilty of robbery or dacoity alongwith other culprits and thirdly, there was no evidence to show that he was armed with any weapon and therefore, he could not be convicted under Section 397 of the I.P.C.

19. Taking into consideration the facts, evidence on record and the legal position, I find that the trial Court has committed serious error in convicting the accused/appellant for the offences punishable under Sections 353, 333, 395 and 397 of the I.P.C. Therefore, accused is entitled to be acquitted of all the charges.

In view of this, Suo-Motu Application No.3 of 2002 for the enhancement of sentence does not survive.

20. In the result, appeal is allowed. Impugned order of conviction and sentence to the extent of the present appellant is hereby set aside. Accused is acquitted of all the charges and he be set at liberty forthwith if not required in any other case.

21. In the result, Suo-Motu Application No.3 of 2002 pertaining to show cause notice for enhancement of sentence under Section 397 of the I.P.C. also become infructuous and stands disposed off accordingly.

(J.H.Bhatia,J.)